Editor's Note: appeal filed, Civ. No. A02-116 (D. Alaska), aff'd (June 19, 2003), motion for reconsideration denied (July 17, 2003)

HEIRS OF DAVID F. BERRY

IBLA 94-22 Decided April 24, 2002

Appeal from a decision by District Chief Administrative Law Judge John Rampton denying an application for an award of fees and expenses under the Equal Access to Justice Act.

Affirmed as modified.

1. Alaska: Native Allotments--Attorney Fees: Equal Access to Justice Act: Application and Jurisdiction--Equal Access to Justice Act: Application

   A contest of an Alaska Native Allotment Act claim is an "adversary adjudication" under the definition in the Equal Access to Justice Act.

2. Alaska: Native Allotments--Attorney Fees: Equal Access to Justice Act: Application and Jurisdiction--Equal Access to Justice Act: Application

   An application for an award of fees and expenses to a prevailing party under the Equal Access to Justice Act is properly denied when the agency's position in the proceeding is "substantially justified" based on the record as a whole.

APPEARANCES: Bruce L. Brown, Esq., Russell L. Winner, Esq., and Bruce A. Moore, Esq., Anchorage, Alaska, for the heirs of David F. Berry; James R. Mothershead, Esq., Office of the Regional Solicitor, U. S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

David F. Berry filed a claim under the Act of May 17, 1906 (the Alaska Native Allotment Act), for land along the Ferebee River about a mile north of Tayaisanka Harbor near Haines, Alaska, in November 1971.

There was confusion about what land Berry intended to claim because, when he returned upriver by airboat to mark it on the ground in 1972, he traveled past the land he had described in his application. Based on an October 1972 field examination and on interviews with Berry, however, Bureau of Land Management (BLM) Realty Specialist Stanley Bronczyk concluded that Berry had not substantially used and occupied the land he

wanted for the five years required by the Native Allotment Act and its implementing regulations. March 1974 Field Report at 5. BLM approved this conclusion in April 1975.

BLM sent Berry the Field Report in May 1975 and gave him an opportunity to provide support for his claim and suggested he submit a revised description of the land. Berry's June 1975 response named a different parcel than either described in his application or described later in his interviews with BLM.

Berry died in 1979. His claim has since been pursued by his heirs.

To resolve the question of the location of Berry's claim, BLM conducted a second field examination, accompanied by his widow and son, in 1984. Although BLM Realty Specialist William Peake could determine that Berry actually intended to claim the land he described in his interviews with Bronczyk, he could not find any marked corners, improvements, or evidence of use and occupancy. He could not conclude whether Berry had satisfied the requirements of the Act and 43 CFR Part 2561. April 1985 Land Report at N.A. 1 - N.A. 4.

Accordingly, in 1988, BLM initiated a contest challenging the validity of Berry's claim. The State of Alaska intervened in the proceeding because it had filed a conflicting claim under the Alaska Statehood Act. Administrative Law Judge Harvey Sweitzer conducted a hearing in accordance with the procedures set forth in our decision in Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976).

In 1989 Judge Sweitzer issued a decision dismissing BLM's contest and concluding that Berry had demonstrated his entitlement to the claim. Both BLM and the State of Alaska appealed to us. We affirmed Judge Sweitzer's decision in United States v. The Heirs of David F. Berry, 127 IBLA 196 (1993).

Meanwhile, Berry's heirs applied for an award of attorney fees and expenses under the Equal Access to Justice Act (EAJA) based on Judge Sweitzer's favorable decision. In October 1993 Administrative Law Judge John Rampton concluded the heirs were not eligible for an award because the contest proceeding against Berry's claim was not an "adversary adjudication" as defined in the EAJA, i.e., was not an "adjudication under section 554 of [Title 5, U.S.C.]." 5 U.S.C. 504(b)(1)(C) (1994). Section 554 of the Administrative Procedure Act (APA) applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554 (1994) (emphasis added). Rather than being required by statute, Judge Rampton noted, the adjudication of Berry's claim was required in order to conform to constitutional requirements of procedural due process in accordance with the decision of the U.S. Court of Appeals for the Ninth Circuit in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

Berry's heirs appealed Judge Rampton's decision to us. At BLM's request, we suspended consideration of the appeal pending the outcome of

the Department's appeal to the Ninth Circuit of the decision of the U.S. District Court for the District of Idaho in Collord v. U.S. Department of the Interior, No. 94-0432-S-BLW (Aug. 26, 1996, D. Idaho). In that decision the District Court concluded that the prevailing party in a mining claim contest was eligible for an award of attorney fees under the EAJA even though the contest was not required by statute.

The Ninth Circuit affirmed the U.S. District Court in Collord v. U.S. Department of the Interior, 154 F.3rd 933 (9th Cir. 1998). The Ninth Circuit's decision acknowledged that the General Mining Law of 1872 does not require mining claim contest proceedings to be conducted under section 554 and that the Department's regulations implementing the EAJA , 43 CFR 4.603(a), "do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554." 154 F.3rd at 935.

The Ninth Circuit observed, however, that a mining claim is a property right that may not be extinguished without the due process afforded by the Fifth Amendment to the U.S. Constitution. Swanson v. Babbitt, 3 F.3rd 1348, 1350 (9th Cir. 1993); United States v. O'Leary, 63 I.D. 341, 344-345 (1956). Relying on Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950), and Adams v. Witmer, 271 F.2d 29, 33 (9th Cir. 1958), the Ninth Circuit held that section 554 of the APA governed the mining claim contest proceeding: "Because the mining claim contest proceeding before us is governed by section 554, it is an 'adversary adjudication' under the natural reading of the words 'under section 554' in the EAJA [i.e., 'subject to' or 'governed by' section 554], as enunciated by the Supreme Court [in Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 135 (1991)]." 154 F.3rd at 936. In Ardestani, the Ninth Circuit noted, the hearing was governed by provisions of the Immigration and Naturalization Act that superseded the hearings provisions of the APA. That distinguishes Ardestani, in which the Supreme Court did not allow an award under the EAJA, from the General Mining Law of 1872, which has no provisions to protect a claimant's property interests in a contest proceeding. Id. We have acknowledged the applicability of the EAJA to mining claim contests. U.S. v. Willsie, 155 IBLA 296, 297 (2001).

[1] Like the General Mining Law of 1872, the Alaska Native Allotment Act contains no provisions governing the procedures that apply when the Government challenges the validity of a claim. Like a mining claim, a claim to land under the Native Allotment Act is a sufficient property interest to warrant due process protection. Pence v. Kleppe, supra at 141-143. The procedures set forth in our decision in Donald Peters following the Ninth Circuit's decision in Pence are the same as those that apply in the contest of a mining claim, 43 CFR 4.451-4.452. We conclude that a contest of a Native Allotment Act claim is an "adversary adjudication" under the definition in the EAJA. Collord v. U.S. Department of the Interior, 154 F.3rd at 937. In view of the Ninth Circuit's decision in Collord, our decisions limiting an award under the EAJA to adjudications required by statute but not by due process -- e.g., Benton C. Cavin, 93 IBLA 211, 216-217 (1986), upon which Judge Rampton relied -- are no

longer tenable. See Hart v. BLM, 154 IBLA 260, 263 (2001); cf. Chugach Alaska Corp., 146 IBLA 286, 288 (1998).

That conclusion leads us to the question whether BLM's position in the contest proceeding it initiated against Berry's claim was "substantially justified." This question arises from the provision of the EAJA that states that an agency shall award fees and other expenses to the prevailing party, which Berry's heirs were, "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified * * * determined on the basis of the administrative record as a whole." 5 U.S.C. 504(a)(1) (1994). 1/

[2] "Substantially" justified does not mean "'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person * * * [i.e., having a 'reasonable basis both in law and fact']." Pierce v. Underwood, 487 U.S. 552, 565 (1988). BLM's position may be substantially justified even if it is not ultimately vindicated by the evidence. BLM v. Ericsson, 98 IBLA 258, 263-264 (1987); Kaycee Bentonite Corp., 79 IBLA 182, 194-196, 91 I.D. 138, 145-146 (1984). The burden is on BLM to prove substantial justification. Barry v. Bowen, 825 F.2d 1324, 1330 (9th Cir. 1987). Even if the government's position initially was substantially justified, an award may be made for an appropriate period if it later becomes evident it was no longer so justified. BLM v. Cosimati, 131 IBLA 390, 396 (1995).

Berry's heirs argue that BLM's position was not substantially justified because neither of the BLM field examiners actually inspected the allotment before the contest complaint was filed nor did BLM interview any of the contestee's witnesses prior to the hearing. "Thus, the Federal agency unreasonably maintained its position knowing that its contest was legally flawed and without investigating the facts." Application for Costs

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1/ Under normal circumstances, we would refer this question to the "adjudicative officer," i.e., the person who presided at the adversary adjudication. 43 CFR 4.602. We believe there is good reason not to do so in this case. As related above, Administrative Law Judge Harvey Sweitzer conducted the hearing on BLM's contest complaint and issued a decision in 1989, a decision we affirmed on review in 1993. For reasons that are not clear, the heirs' January 1990 application for attorney fees was apparently not assigned to Judge Sweitzer but to Judge Rampton, who is now retired. Because Judge Rampton considered Berry's heirs ineligible for an award under the law as it then stood, he did not reach the question whether BLM's position was substantially justified in his October 1993 decision. Subsequently, the heirs' appeal to us was suspended for several years and only became ripe when BLM filed its answer in July 2001. In our view, it would be a disservice to the administrative process to prolong this case by referring it back to the Hearings Division, presumably for assignment to Judge Sweitzer, when, as discussed below, we can readily answer the question based on our familiarity with the record and our previous decisions whether an agency's position has been substantially justified. See U.S. v. Willsie, supra at 297, n. 1; Herbert J. Hansen, 119 IBLA 29, 30 (1991).

and Fees at 2. Berry's heirs argue further that BLM was not justified in pursuing the contest even after the State of Alaska and Berry's heirs were willing to settle by allowing the state an easement over the land Berry claimed. "Since either the allottees or the State would end up with the allotment land after the contest, it was unreasonable for the Department of the Interior to refuse to drop the contest at that time." Id. at 3.

We cannot agree. An applicant for land under the Alaska Native Allotment Act must demonstrate entitlement to a grant of public land. Angeline Galbraith, 97 IBLA 132, 155, 94 I.D. 151, 163 (1987). It is BLM's responsibility to determine whether an applicant has done so; it is not certain the land would have gone to the state if Berry had not qualified. United States v. Heirs of Thomas Bennett, 144 IBLA 371, 376 (1998). BLM's interviews, field examinations, and reports concerning Berry's claim were an adequate basis for its initial contest complaint. United States v. Pestrikoff, 134 IBLA 277, 284 n. 10 (1995). At the hearing, BLM presented sufficient evidence (although "barely so," in Judge Sweitzer's view, Decision at 7) for a prima facie case that Berry had not affirmatively shown qualifying use and occupancy. United States v. Galbraith, 134 IBLA 75, 99-101 (1995). Judge Sweitzer held that Berry's heirs had overcome BLM's prima facie case by a preponderance of the evidence, but cited "the paucity of evidence on either side adduced at the hearing." Decision at 10. We also noted the "meager" evidence in the case in our decision affirming Judge Sweitzer. 127 IBLA at 210.

Based on our review of the entire record, including Judge Sweitzer's decision and our decision on appeal, we find BLM had a reasonable basis in both law and fact for its original contest of Berry's claim and for its appeal of Judge Sweitzer's decision. As in Kaycee Bentonite, supra, although Berry's heirs prevailed in this case, they did so narrowly. Under such circumstances it is appropriate to find that the agency's position was substantially justified. BLM v. Ericsson, supra at 264.

We conclude that a contest of an Alaska Native Allotment Act claim, like a contest of a mining claim, is an adversary adjudication under the EAJA. We also conclude, under the circumstances of this case, that BLM was substantially justified in prosecuting its contest of Berry's claim. Therefore, although eligible for an award, Berry's heirs may not receive the attorney fees and expenses for which they have applied.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Administrative Law Judge Rampton's decision denying the application for an award of fees and expenses under the EAJA is affirmed as modified.

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Will A. Irwin
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge